No. 95-210

Supreme Court, U.S.
FILED
DEC 21 1995
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In the Supreme Court of the United States

OCTOBER TERM, 1995

HOLLY FARMS CORPORATION;
TYSON FOODS, INCORPORATED,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

CHAUFFEURS, TEAMSTERS AND HELPERS,
LOCAL 391, 29, 71, 355, 592, 657, 988,
AND ALL AFFILIATED WITH THE
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Intervenors.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE FOR THE AMERICAN FARM BUREAU FEDERATION, THE ALABAMA FARM BUREAU FEDERATION, THE NORTH CAROLINA FARM BUREAU FEDERATION, AND THE NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS IN SUPPORT OF PETITIONERS

JOHN J. RADEMACHER
MICHAEL J. STIENTJES
American Farm Bureau Federation
225 Touhy Avenue
Park Ridge, IL 60068
(312) 399-5700

ROBERT P. DAVIS
Counsel of Record
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

[Additional Counsel are listed on the Signature Page]

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INTEREST OF THE AMICI CURIAE

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit

Corporation Act of the State of Illinois. AFBF was founded to protect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. It has member organizations in all 50 states and Puerto Rico, including *amici* Alabama Farm Bureau and North Carolina Farm Bureau (collectively, with AFBF, "Farm Bureau"), representing more than 4.5 million member families. Farm Bureau first expressed its long-standing interest in the proper construction of § 3(f) of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 203(f), to this Court as *amicus curiae* in *Maneja* v. *Waialua Agric. Co.*, 349 U.S. 254, 256 (1955).

The North Carolina Farm Bureau is a non-profit corporation, organized and domiciled in North Carolina, with its principal office located in Raleigh, North Carolina. North Carolina Farm Bureau is North Carolina's largest general farm organization with a voluntary membership of over 374,000 families. The organization is dedicated to improving the quality of life for North Carolina's farmers and rural residents, including the increase of net farm income.

The Alabama Farm Bureau is a non-profit corporation organized and domiciled in Alabama, with its principal office located in Cullman, Alabama. It represents 3,000 member families. The purposes of the Alabama Farm Bureau are to promote, protect and represent the business, economic, social and educational interests of the family farm in Alabama. It works toward the betterment of conditions of persons engaged in agricultural pursuits, the improvement of the grade of agricultural products, and the development of a higher degree of proficiency in agriculture.

The National Council of Agricultural Employers is a Washington, D.C.-based association representing growers and agricultural organizations throughout the United States on agricultural labor and employment issues. Its membership includes farm cooperatives, growers, packers, processors, and agricultural associations in all 50 states. Collectively, they

employ about 75 percent of the nation's total agricultural workforce.

The *amici* and their members have a direct interest in the outcome of this case. Many of the activities involved in modern production agriculture, such as irrigation, fertilizer and pesticide application, and harvesting, require services to be performed on the farm at particular times in the season. Because these services are needed only episodically, most farmers rely upon contractors who can spread their equipment and personnel costs among multiple farm customers. The personnel who provide these services are employed in "agriculture," subject to the agricultural provisions of the National Labor Relations Act (NLRA) and the FLSA at issue in this case. The contrary decision of the National Labor Relations Board (NLRB or Board) is inconsistent with the express language and legislative history of the statutory definition of "agriculture" and erodes the protections given by statute to the employers of agricultural laborers who perform services on the *amici's* members' farms. The *amici* and their members also have an interest in avoiding an unwarranted narrowing of other farm-related provisions in the FLSA which are based on the FLSA's definition of "agriculture."[1]

SUMMARY OF ARGUMENT

The term "agriculture," as used in the FLSA and made applicable to the NLRA, encompasses primary farming and, secondarily, a wider range of practices which are incident to, or performed in conjunction with, primary farming operations. Secondary agriculture includes practices performed "by a farmer" *and* practices performed "on a farm" by a person who is not a farmer or employed by a farmer. 29 U.S.C. § 203(f). The NLRB and the court below, by looking

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

solely at the status of the live-haul unit employer, disregarded the alternative, "on a farm," locus-of-services element of the statutory definition.

Chicken catchers and forklift drivers in live-haul units are agricultural laborers because these employees of the petitioner perform work on a farm in conjunction with the primary farming activity of raising poultry. Live-haul drivers are agricultural laborers because they perform the secondary agriculture function of "delivery to storage," 29 U.S.C. § 203(f), for their employer who resumes farmer status between the grow-out farm and the point when the chickens leave storage for processing.

This statutory interpretation is supported by the legislative history of the FLSA's definition of "agriculture," a source to which this Court has turned at least twice. *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, 767 (1949); *Maneja* v. *Waialua Agric. Co.*, 349 U.S. 254, 260 (1955). The bill that became the FLSA was amended during passage to include in the definition of "agriculture" work performed "on a farm" and "delivery to storage or to market." The Senate debate over these provisions in 1937 clearly shows that the term "agriculture" should be construed expansively.

While decisions of the NLRB construing the NLRA are treated deferentially on judicial review, the broad deference accorded the Board by the court below is inappropriate. This case, unlike *Bayside Enter., Inc.* v. *N.L.R.B.*, 429 U.S. 298, 302 & n.10 (1977), solely involves a question of statutory interpretation where the NLRB has made legal errors. The statute being interpreted is the FLSA, which has not been entrusted to the NLRB to administer. Even under a deferential standard of review, however, the decision should not stand because it has no reasonable basis in the language or legislative history of the statute. Finally, if the Court decides to defer to the NLRB in this case, it should explicitly limit its holding to the National Labor Relations Act as administered

by the Board, so that lower courts do not defer to the NLRB's rationale when construing the definition of "agriculture" in cases arising only under the FLSA.

ARGUMENT

I. THE NLRB'S INTERPRETATION OF THE AGRICULTURE DEFINITION SHOULD NOT BE ENFORCED BECAUSE IT IS INCONSISTENT WITH THE PLAIN MEANING OF THE STATUTE.

The National Labor Relations Act specifically exempts agricultural laborers from the broad scope of its definition of "employee." 29 U.S.C. § 152(3). Congress, through annual appropriations riders, *e.g.*, 108 Stat. 2569-2570 (1994), has tied the agricultural laborer exception to the definition of "agriculture" in § 3(f) of the FLSA. In deciding whether Holly Farms' chicken catchers, forklift drivers, and live-haul drivers were agricultural laborers, it is FLSA § 3(f) "and the decisions construing it which are relevant even though this proceeding arose under the NLRA." *Bayside*, 429 U.S. at 300 & n.6.

This Court has explained that the FLSA's definition of "agriculture"[2] has two distinct meanings. The primary meaning includes farming in all its branches, including those

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[2] "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

29 U.S.C. § 203(f).

practices (such as poultry raising) listed specifically in the definition. *Farmers Reservoir*, 337 U.S. at 762-763. The secondary meaning is broader:

> Agriculture is defined to include things other than farming as so illustrated. It includes any practices, whether or not themselves farming practices, which are performed *either by a farmer or on a farm*, incidentally to or in conjunction with "such" farming operations.

Id. at 763 (emphasis added). It is the meaning of "on a farm" which is the principal issue in this case, and which the NLRB and the court below erred in interpreting.

A. The "On A Farm" Component Of The Secondary Meaning Of "Agriculture" Does Not Depend Upon The Employer Of The Laborer.

The NLRB, and the majority below, held that employees who work "on a farm" can be considered exempt agricultural laborers only if that work is performed incidental to or in conjunction with their employer's primary agricultural practices. As Judge Niemeyer explained in his partial dissent, work "on a farm" is covered when it is performed incident to or in conjunction with primary farming as defined functionally in the statute (which includes poultry raising), with no limiting reference to the agricultural practices of the employer.[3] *Holly Farms Corp.* v. *N.L.R.B.*, 48 F.3d 1360, 1373 (4th Cir. 1995).

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[3] The principal cases from this Court relied upon by the majority below are inapposite, for they construe the "by a farmer" component of the test in circumstances where the Court concluded that the work was *not* done on a farm. *Farmers Reservoir*, 337 U.S. at 767-769 (work, not done on the farm, was performed for an employer who was not engaged in farming); *Bayside*, 429 U.S. at 301 (where work not done on a farm, "by a farmer" test "depends on the character of the employer's activities.").

The statute limits on-farm work by looking at whether such work is "incident to or in conjunction with" farming activities, instead of looking at the activities of the employer. As Senator Black, the author of the definition of "agriculture," put it during the Senate debate on the FLSA, "For instance, a farmer might build on his farm a factory for the purpose of manufacturing shirts and sending them throughout the United States * * * * [T]hat would not be considered a farming activity." 81 Cong. Rec. 7657-7658 (1937).

This Court construed the "on a farm" test forty years ago in determining the status of laborers working in a sugar milling operation located on a large sugar cane plantation. *Maneja* v. *Waialua Agric. Co.*, 349 U.S. 254 (1955). In determining whether the workers in the mill were agricultural employees, the Court remarked that "the question here presented is a limited one: is the milling operation part of the agricultural venture?" *Id.* at 265. The Court answered the question by determining whether the type of work was ordinarily performed by farmers. *Id.* at 265-266. If the type of work is ordinarily performed by farmers, it is probably incident to the farming operation; if not, the process may be "more akin to manufacturing than to agriculture." *Id.* at 265. Thus, the relevant inquiry is whether the type of work in question is ordinarily performed by a farmer, rather than whether the employer is engaged in farming activities.

B. The Live-Haul Employees In This Case Are Engaged In "Agriculture" Under The Statutory Definition.

Under the proper statutory analysis, each of the three different types of live-haul employees are agricultural laborers. Chicken catchers and forklift drivers perform primary farming activity as well as secondary farming activity on a farm, and live-haul drivers perform secondary farming activity for a farmer.

1. Chicken catchers are engaged in "agriculture" under the statutory definition.

Chicken catchers fall squarely within the agriculture definition because they work "on a farm." The NLRB conceded this point below. See *Holly Farms*, 48 F.3d at 1371. As it is self-evident that catching chickens and putting them in crates on the farm is farming activity, this work satisfies the secondary definition of "agriculture." At a minimum, under the *Maneja* test, this activity is more akin to agriculture than it is to manufacturing.

Primary agriculture includes, *inter alia*, "the raising * * * of poultry," and "harvesting of any agricultural * * * commodities." 29 U.S.C. § 203(f). The work of chicken catchers is an essential part of poultry raising. Chicken catchers also are involved in "harvesting" chickens, which are agricultural commodities. See WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY at 86 ("agriculture" is "[t]he science, art, and business of cultivating the soil, producing crops and raising livestock"); 1 BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, 1992 CENSUS OF AGRICULTURE, app. A, at A-6 (including chickens as part of the "Poultry and eggs" category of agricultural commodities); 29 C.F.R. § 780.112 (1995) (stating that the term "agricultural commodity" includes "domesticated animals and some of their products"). The Secretary of Labor, who is responsible for interpreting the FLSA, defines "harvesting" as "the actual process whereby agricultural or horticultural commodities are severed from their attachment to the soil or otherwise reduced to possession." 29 C.F.R. § 780.118(b) (1995). The activity of catching chickens and putting those chickens into crates evokes a particularly striking image of "reduc[tion] to possession," and those who perform this work are engaged in primary agriculture.

2. Forklift drivers are engaged in "agriculture" under the statutory definition.

Forklift drivers also qualify as agricultural laborers. The forklift drivers on the live-haul crews take the caged chickens provided by the chicken catchers and load the cages onto a flat-bed truck. Forklift drivers on live-haul crews work "on a farm," as the NLRB conceded. The task of congregating agricultural materials before shipping them off to market has been traditionally performed by farmers, and this work is certainly more akin to agriculture than it is to manufacturing.

Forklift drivers, like the chicken catchers discussed in the preceding section, also are involved in the primary agricultural activity of harvesting. As the Secretary of Labor interprets the term, "harvesting" includes "transportation to a concentration point on the farm." 29 C.F.R. § 780.118(b) (1995). The forklift drivers meet this test, because they transport the caged chickens from the point on the farm where the chickens are caged, to the point on the farm where the cages are loaded onto the truck.

3. Live-haul drivers are engaged in "agriculture" under the statutory definition.

The work of live-haul drivers differs from the work of chicken catchers and forklift drivers. A live-haul driver drives a flat-bed truck, which carries the entire live-haul crew to the farms of the contract growers. Once the chickens have been loaded onto the truck, the live-haul driver delivers the chickens to a storage area near Holly Farms' processing plant.

Much of the work of live-haul drivers is not, unlike the work of other members of live-haul crews, performed "on a farm." Nevertheless, the statutory definition of "agriculture" in § 3(f) of the FLSA expressly includes the task of "delivery to storage" within the boundaries of secondary agriculture.

Accordingly, live-haul drivers are engaged in agriculture if their work is done "by a farmer," which depends upon whether Holly Farms, the drivers' employer, is engaged in primary agriculture at relevant intervals with respect to the chickens. See *Bayside*, 429 U.S. at 301.

The agriculture definition is very broad, and Congress intended for it to cover all phases of the agricultural process. Beginning with activities such as cultivating the soil or undertaking preparatory secondary farming activities incident to the raising of poultry, agriculture continues until the agricultural commodity in question has been safely delivered to market, storage, or a common carrier. As this Court indicated in *Maneja*, agriculture ends when the agricultural commodity is used in a manufacturing process. Until such time, however, the process of agriculture continues unabated.

For example, in *Mitchell* v. *Budd*, 350 U.S. 473 (1956), the Court held that a bulking plant changed the nature of tobacco, and thus was "'more akin to manufacturing than agriculture.'" *Id.* at 481-482 (quoting *Maneja*, 349 U.S. at 265). Because the bulking plant engaged in manufacturing, the agricultural process ended "with the delivery of the tobacco at the receiving platform of the bulking plant. That is the 'delivery * * * to market' within the meaning of § 3(f) of the Act." *Mitchell*, 350 U.S. at 481 (quoting 29 U.S.C. § 203(f)). In the case at bar, Holly Farms' poultry processing plant engages in manufacturing, and the agricultural process ends at the storage sheds, from which the chickens are taken for processing.[4]

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[4] The Board may argue that the agricultural process ends on the farm of the contract grower rather than at the storage shed. Alternatively, the Board may attempt to characterize the live-haul drivers' work as incidental to Holly Farms' poultry processing work rather than incidental to Holly Farms' raising of poultry. (continued...)

Once it is understood that the trip from the grow-out farm to the storage shed involves agriculture, the only question remaining is who constitutes the farmer at that stage. The only two choices, of course, are Holly Farms and the contract grower. The Board acknowledges that Holly Farms' hatchery operation is primary agriculture. Under the Board's theory (as adopted by the court below), however, once Holly Farms turns the chicks over to the contract growers, Holly Farms irrevocably loses its status as a farmer with respect to those chicks. See *Imco Poultry*, 202 N.L.R.B. 259, 260 (1973) ("when an employer contracts with independent growers for the care and feeding of the employer's chicks, the employer's status as a farmer engaged in raising poultry ends with respect to those chicks.").

What *Imco Poultry* shows, however, is that no chicken can serve two farmers. Once the contract growers undertake the responsibilities of raising the chickens, Holly Farms' status as a farmer engaged in the primary agricultural activity of raising chickens is suspended. Because the vertically integrated chicken producer retains title to the chickens while they are on the contract farms, *Imco Poultry* can only be based on a possession theory. Whoever has physical possession of the birds acts as a farmer so long as the process of agriculture is continuing. Once Holly Farms regains physical possession of the chickens, it should also resume its farmer

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[4] (...continued)
Such arguments should be rejected as being flatly inconsistent with the language and intent of the agriculture definition. The statutory language expressly includes "delivery to storage" as agricultural activity; any attempt by the Board to end the process sooner is in flagrant derogation of the wording of the definition. Similarly, the Board cannot point to any indication that Congress intended for manufacturing to be construed broadly, or that Congress recognized the concept of "secondary manufacturing" that would incorporate practices incident to manufacturing.

status with respect to the birds, through "delivery to storage," 29 U.S.C. § 203(f), to the point in the process where manufacturing begins.

Thus, Holly Farms is engaged in the primary agricultural activity of raising poultry when the live-haul drivers do their work. Because live-haul drivers are employed by a firm engaged in primary agricultural activity, their secondary agricultural activity qualifies as work performed "by a farmer" under the definition. The inescapable nature of this conclusion has been addressed by the Fifth Circuit:

> Transportation of grownout broiler chickens from the contract farms where they are raised to the processing plants where they are sold is clearly work performed "by a farmer * * * as an incident to or in conjunction with" [a vertically integrated poultry firm's] primary farming task of raising poultry. Any doubt that this is the case is removed by the express statutory language including "preparation for market" and "delivery to storage or to market" as practices incidental to any agricultural enterprise.

Coleman v. *Sanderson Farms*, 629 F.2d 1077, 1081 (5th Cir. Unit A 1980) (quoting 29 U.S.C. § 203(f)). See also *N.L.R.B.* v. *Victor Ryckebosch, Inc.*, 471 F.2d 20 (9th Cir. 1972) (live-haul drivers are agricultural laborers). Therefore, when live-haul drivers perform the statutorily-defined secondary agricultural activity of "delivery to storage," they are agricultural laborers excluded from the scope of the NLRA.

II. THE NLRB'S INTERPRETATION OF THE FLSA'S DEFINITION OF "AGRICULTURE" IS INCONSISTENT WITH THE LEGISLATIVE HISTORY OF THE STATUTE.

A. Congress Intended a Broad Definition of "Agriculture" Covering Work of Third-Party Employees On A Farm.

Senator Black, the author of the agricultural exception in the FLSA, explained on the floor of the Senate that his bill had been drawn carefully to exclude agricultural laborers of all kinds from the scope of the Act:

> It specifically excludes workers in agriculture of all kinds and of all types. There is contained in the measure, perhaps, the most comprehensive definition of agriculture which has been included in any one legislative proposal.
>
> We have placed together in the bill definitions of agricultural work which have been fixed from time to time in other legislative enactments, and in addition to that we have drawn liberally from Mr. Webster's definition of agriculture.

81 Cong. Rec. 7648 (1937) (statement of Senator Black).

Notwithstanding Senator Black's assurances, other senators became concerned that the proposed definition was not sufficiently comprehensive. When the bill was first introduced, secondary agriculture was defined as "any practices ordinarily performed by a farmer as an incident to such farming operations." 81 Cong. Rec. 7653 (1937). The senators knew that farmers frequently found it necessary to engage others to perform on-farm agricultural work. These senators were concerned that the work of persons employed by such businesses would not fall within the scope of the definition as originally drafted:

Mr. TYDINGS: The threshing of wheat and similar crops on the farm would be classed as coming within the agricultural exemption; would it not?

Mr. BLACK: I so understand.

Mr. TYDINGS: What I am thinking of is that quite often the threshing crew is not a part of the farmer's organization. There are men who make a business of going around with threshing and baling machines with enough help to come upon a farm and make a contract with the farmer to thresh his wheat. I should like to know if in such a case it is the Senator's opinion that the threshing crew would be exempt, or whether they would be under the operation of the hours provision of the bill. * * *

> I am asking this question because I believe, inadvertently, a loophole has been left which I am sure the proponents of the bill do not mean to leave. * * * [A]s I understand, farming in all its operations, from the time the grain is put into the ground until it leaves the farm, is to be exempted from the provisions of the measure; but under the bill such a man as I have indicated is not exempt.

81 Cong. Rec. 7653 (1937).

At least one senator, however, believed that such employees should not be considered agricultural laborers:

> I think the business experience of us all will justify the conclusion that if a man operates a threshing outfit, and goes from one farm to another farm, such a man is an independent contractor. He is not a farmer. That is not an operation incident to farming, because the man

> is engaging in a cold-blooded business operation, going from one farm to another, precisely as a huckster goes around and sells tinware to farmers.

81 Cong. Rec. 7659 (1937) (statement of Senator Bone).

In order to clarify that workers performing agricultural work on farms were to be included in the definition, the Senate adopted Senator McGill's amendment, which added the words "or on a farm" and "including delivery to market" to the secondary meaning of "agriculture." 81 Cong. Rec. 7888 (1937). Although the independent-contractor wheat thresher was the paradigm example of an agricultural laborer to be included under the amendment, Senator McGill clearly indicated that the amendment applied to any farm commodity:

> Mr. GEORGE: Is it the purpose of the amendment to exempt those who thresh grain?
>
> Mr. McGILL: Those who thresh grain, who harvest grain and deliver it to market.
>
> Mr. GEORGE: Would the amendment also apply to the harvesting of any other crop?
>
> Mr. McGILL: It would apply to any commodity produced on a farm.

Ibid. Senator McGill also explained that the amendment was intended to apply broadly to on-farm work:

> Mr. McGILL: I may say to the Senator from Georgia and other Senators that it is my object to make the language of the amendment broad enough to include all work done on a farm, so long as it is incidental to agricultural purposes * * * * and the language would also include all labor performed in making delivery to market.

Ibid. The Senate approved Senator McGill's amendment, *ibid.*, and the language was incorporated into the final version

of § 3(f) of the FLSA. See 29 U.S.C. § 203(f). The House of Representatives subsequently expanded the agriculture definition even further by adding the "delivery to storage" language. See H.R. Rep. No. 2182, 75th Cong., 3d Sess. (1938).

B. The NLRB's Decision is Contrary to the Legislative History, Renders the Agriculture Exception Meaningless, and Burdens American Farmers.

The legislative history of the FLSA shows clearly that Congress intended the term "agriculture" to include on-farm farming work and delivery to storage, performed by third-party employees. This Court has used the legislative history as an aid to interpreting the agriculture provision in *Farmers Reservoir*, 337 U.S. at 767, and in *Maneja*, 349 U.S. at 260. The Fifth Circuit provided a thorough analysis of the legislative history in an FLSA case construing § 3(f). *Reich* v. *Tiller Helicopter Serv.*, 8 F.3d 1018, 1023-1027 (5th Cir. 1993). Significantly, none of the cases adopting the NLRB's present construction of the statute even mention the legislative history. See, *e.g.*, *Holly Farms Corp.* v. *N.L.R.B.*, 48 F.3d 1360 (4th Cir. 1995); *N.L.R.B.* v. *Hudson Farms, Inc.*, 681 F.2d 1105 (8th Cir.) (per curiam), cert. denied, 459 U.S. 1069 (1982); *Valmac Indus.* v. *N.L.R.B.*, 599 F.2d 246 (8th Cir. 1979). Thus, none of these courts has faced the impossible task of reconciling the NLRB's construction with the agriculture definition's legislative history.

The erroneous reasoning in the NLRB's interpretation and the decision of the court below can be seen clearly in the following example. Assume that a farmer wishes to engage a non-farmer third party and his or her employees to perform secondary agricultural tasks on a farm. The laborers thus hired are precisely those to whom Senator McGill's amendment was designed to apply. Under the decisions of this Court, the laborers would be employed in "agriculture." Under the NLRB's interpretation, however, the laborers would be dragged within the scope of the NLRA as "employees" because the laborers' employer (the third party with whom the farmer contracts) does not perform primary farming. The NLRB's interpretation renders the agricultural labor exception meaningless. The fact that the NLRB's interpretation reaches an incorrect result in a case explicitly anticipated by a legislative amendment shows that the Board's decision does not have a reasonable basis in law.

By turning its back on clear congressional intent, the NLRB destroys the value of the agricultural exemption to farmers. In today's economic environment in production agriculture, farmers are increasingly finding it necessary to seek out the specialized efficiency of third parties to perform secondary agricultural tasks. If, contrary to Congress' desires, the NLRB succeeds in placing such third parties outside of the agricultural exemption, the contractors will be subject to vastly increased costs in the form of unionization costs and overtime costs under the FLSA. Such costs will almost certainly be passed through to the farmer employing the independent contractor, and will add significantly to the cost of production agriculture.

Modern production agriculture has also been characterized by increased vertical integration. Vertical integration allows farmers to reduce costs that would otherwise become prohibitive. See Allen M. Featherstone & Bruce J. Sherrick, *Financing Vertically Coordinated Agricultural Firms*, 74 AM. J. AGRIC. ECON. 1232, 1235 (1992) (referring to cost efficiencies resulting from the reduced transaction and agency costs, improved scale, and improved technology adoption). Vertical integration has also become necessary to obtain maximum productivity from agricultural assets. See *id.* at 1237 (observing that vertical integration in the hog sector could release between 20% and 40% of assets from a farmer's balance sheet and allow for more productive use of those assets). The evolving challenges of modern production agriculture will continue to require farmers to internalize some agricultural production functions and to contract others

away. By reading the words "on a farm" out of the agriculture definition, the NLRB is imposing huge costs on the farming community.

III. THIS COURT SHOULD NOT DEFER TO THE INTERPRETATION OF THE NLRB.

This case comes to the Court after deferentially limited review by the court below. Several factors in this case point away from judicial deference to the NLRB's decision. Even if the most deferential standard were to be applied, however, the NLRB's decision cannot survive scrutiny.

A. Under The Circumstances Of This Case, The NLRB Does Not Deserve Extensive Deference From This Court.

Although this Court deferred to the NLRB in analogous circumstances in *Bayside*, 429 U.S. at 303-304, several circumstances in this case indicate that deference is not appropriate. First, the NLRB in this case is interpreting statutory language, not making fundamental policy choices or finding facts. Second, the language that the NLRB is interpreting has not been committed to that agency's discretion. Finally, Congress has announced in a separate statutory command that the NLRB is not to expand its jurisdiction at the expense of farming in America.

The NLRB is entitled to broad deference when making factual determinations, *N.L.R.B.* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 691 (1951) (citing *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951)), or developing fundamental national labor policy. *Beth Israel Hosp.* v. *N.L.R.B.*, 437 U.S. 483, 500 (1978). In the case at bar, however, the facts are agreed upon, and the NLRB has construed unambiguous statutory language. This Court has made clear that:

> Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions.

N.L.R.B. v. *Brown*, 380 U.S. 278, 291-292 (1965). It is the judiciary, not the NLRB, that is the final authority on statutory construction, and this Court must reject administrative constructions that are contrary to clear congressional intent. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

Courts should defer to an agency's interpretation of a gap in a statute that Congress entrusted the agency to administer. *Id.* at 842-843. In the present case, however, the NLRB interpreted a provision of the FLSA, a statute entrusted by Congress to the Secretary of Labor. According to the Secretary of Labor's interpretation of the FLSA (discussed *supra* in section I.B), it appears likely that the Secretary would at least find chicken catchers and forklift drivers to be employed in "agriculture" under the FLSA. Indeed, substantive interpretation by the NLRB of § 3(f) of the FLSA may intrude inappropriately into construction of this section in FLSA cases. See, *e.g.*, *Marshall* v. *Abbott Farms, Inc.*, 559 F.2d 1006, 1007 & n.1 (5th Cir. 1977).

The appropriations rider that directs the use of § 3(f) of the FLSA also suggests that deference should not be granted here. The appropriations rider contains the following cautionary language:

> *Provided*, That no part of this appropriation shall be available to organize or assist in organizing agricultural laborers or used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of

> agricultural laborers as referred to in section 2(3) of the [NLRA], and as defined in section 3(f) of the [FLSA] * * * *

108 Stat. 2570 (1994). The fact that Congress felt so strongly about protecting the boundaries of the agriculture definition that it made the NLRB's operating funds contingent upon the NLRB abiding by the statutory language is strong evidence that Congress did not want courts deferring to the Board's decisions in this area.[5] The appropriation, set forth in a statute not committed to the NLRB's discretion, expresses deep congressional concern that the NLRB will illegitimately attempt to expand its jurisdiction at the expense of the agriculture definition. In order for this Court to effectuate this clearly expressed congressional intent, it must scrutinize the NLRB's decisions construing the agriculture definition.

B. If The Court Were To Show Deference To The NLRB's Decision, The Bargaining Order Should Not Be Enforced Even Under The Relaxed Standard Of Review.

Earlier this Term, this Court indentified the factors it will consider when applying deferential review to a decision of the NLRB. See *N.L.R.B.* v. *Town & Country Elec., Inc.*, No. 94-947, slip op. (November 28, 1995). In that case, the Court evaluated the NLRB's decision against the statutory language, the statutory purpose, the legislative history, and the relevant precedent. See *id.* at 5-6. As has been demonstrated *supra*, the Board's decision in this case contravenes the statutory language and violates manifest congressional intent. It runs foul of precedent such as *Maneja*, and runs

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[5] The appropriations rider may not be dismissed as a lonely indication of subsequent congressional intent. Congress has consistently maintained this policy for almost 50 years by inserting identical language in the NLRB's appropriation every year since 1946. *Bayside*, 429 U.S. at 300 n.6.

counter to the congressional policy of limiting the Board's jurisdiction to non-agricultural employees. See 29 U.S.C. § 152(3). Thus, the Board's decision does not have a reasonable basis in law, and this Court should refuse to enforce the Board's order.

C. Assuming *Arguendo* That This Court Were To Defer To The Agency's Decision In This Case, The Court Should Expressly Limit Its Holding To The NLRA Context In Order To Prevent The Board's Rationale From Infecting Analysis Under The FLSA.

If, notwithstanding the above compelling reasons not to defer, this Court were to decide in this case that it should defer to the Board, the Court should expressly limit its holding to the NLRA context. As stated above, the agricultural definition is located in the FLSA and materially affects many provisions in that statute of great interest to the farming community. See, *e.g.*, 29 U.S.C. § 213(a)(6) (family farm exemption); 29 U.S.C. § 213(b)(12) (agricultural exemption); 29 U.S.C. § 213(c) (agricultural child labor exemption). The FLSA has been entrusted by Congress to the Secretary of Labor. Given an opinion by this Court deferring to the NLRB's interpretation of the FLSA, many lower courts would likely apply the Board's rationale when applying the FLSA. See *Marshall* v. *Abbott Farms, Inc.*, 559 F.2d 1006, 1007 & n.1 (5th Cir. 1977) (applying NLRA precedent to an FLSA case).

There is no conceivable argument that the Board's views on the agriculture definition should constitute precedent under a separate statute committed to the discretion of a different agency. Accordingly, if the Court should decide to defer to the NLRB in this case, it should expressly limit its holding to the NLRA context in order to prevent the NLRB's rationale from infecting lower courts' analysis under the FLSA.

CONCLUSION

The judgment of the court of appeals should be reversed.
Respectfully submitted.

JOHN J. RADEMACHER
MICHAEL J. STIENTJES
American Farm Bureau Federation
225 Touhy Avenue
Park Ridge, IL 60068
(312) 399-5700

ROBERT P. DAVIS
Counsel of Record
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

ALABAMA FARM BUREAU
4250 Ala. Highway 157
Suite D
Cullman, AL 35055

MICHAEL F. ROSENBLUM
TIMOTHY S. BISHOP
Mayer, Brown & Platt
190 S. LaSalle Street
Chicago, IL 60603

NORTH CAROLINA FARM BUREAU
5301 Glenwood
Raleigh, NC 27612

NATIONAL COUNCIL OF AGRICULTURAL EMPLOYERS
1112 16th St., N.W.
Suite 920
Washington, D.C. 20005

Counsel gratefully acknowledge the assistance of Robert L. Bronston in the preparation of this brief.

DECEMBER 1995